

Attorney Docket No.: F6179(V)
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BRIEF FOR APPELLANT

Sir:

This is a Brief on Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

BRIEF FOR APPELLANT

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Unilever Bestfoods, North America, Division of Conopco, Inc., a corporation of the State of New York.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 1, 5, 7-9, 11, 13, 19 and 20, the pending claims in the application. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

An Amendment/Request for Reconsideration after the Final Rejection had been filed on October 23, 2007, but was not found persuasive by the Examiner.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention set forth in the claims on appeal is Heat Tolerant Farinaceous-Based Food Product. Independent claims 1 is directed to a farinaceous-based food product comprising

- (a) about 1.0% to about 15.0% by weight of a protein additive;
- (b) about 0.25% to about 2.5% by weight of a hydrophobic ester; and
- (c) about 65.0% to about 95.0% by weight of a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein; and
- (d) about 4.0% to about 18.0% by weight water. The food product is formulated and dried in a manner to give a cross-section by scanning electron microscopy that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification. The farinaceous-based food product is firm and non-sticky after cooking.

In the Specification, the portion from page 1, line 15 to page 2, line 5 is background. The phraseology used in claim 1 may be found, for example, on the entirety of page 3 (lines 1-28) to page 4, line 5 of the Specification (summary) as originally filed, as well as in the Figures 1 and 2 as discussed below; on page 5, lines 1-27; page 6, line 26 to page 7, line 1; and page 8, lines 8-11 of the Specification. Beginning at page 9, line 1, working examples, illustrating the unexpected results and superior properties of the composition of this invention, are put forth.

Independent claim 1 is further limited by dependent claims which specify that the protein additive in the farinaceous based food product is dried or liquid egg white, dried or liquid whole egg, gliaden or a mixture thereof (claim 5); the hydrophobic ester has an HLB of under about 13 (claim 7); the hydrophobic ester is mono- or di-acylglyceride, sorbitan ester, sucrose ester, lecithin, or mixture thereof (claim 8); the microscopy image further comprises starch granules homogeneously dispersed therein (claim 9); etc.

Claim 19, which is independently patentable, is directed to a meal kit comprising the farinaceous-based food product of claim 1.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The issues raised in this appeal are as follows:

Claims 1, 5, 7-9, 11 and 13 have been rejected under 35 U.S.C. 102(b) as being anticipated by Ventres, et al. (EP 0350552); Wiley Encyclopedia of Food Science and Technology was cited as evidence.

Claims 19 and 20 have been rejected under 35 U.S.C. 103(a) as being unpatentable over Ventres, et al., in view of Oh, et al. (US 6,217,918).

VII. ARGUMENT

The Claims Are Not Anticipated under 35 USC 102 by Ventres et al. (EP0350552)

Claims 1, 5, 7-9, 11, and 13 were rejected under 35 U.S.C. 102 as anticipated by Ventres et al. (EP0350552). Wiley Encyclopedia of Food Science and Technology was cited as evidence for HLB value of claim 7.

Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

The present invention, as set forth in independent claim 1, is directed to a farinaceous-based food product comprising

- (a) about 1.0% to about 15.0% by weight of a protein additive;
- (b) about 0.25% to about 2.5% by weight of a hydrophobic ester; and
- (c) about 65.0% to about 95.0% by weight of a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein; and
- (d) about 4.0% to about 18.0% by weight water.

Anticipation can only occur when each element of a claim is found, either expressly described or under the principle of inherency, in a single prior art reference or the claimed invention was known or embodied in a single reference. Kalman v. Kimberly Clark Corporation, 713 F.2d 760, 218 U.S.P.Q. 158 (Fed. Cir. 1983), cert. den., 465 U.S. 1026 (1984).

Several features are found in claim 1 which are not disclosed by the reference. Appellants maintain that Ventres fails to disclose, among others, the following Claimed limitations:

- (1) at least about 50.0% by weight of the flour mixture comprising gluten protein;
- (2) about 1.0% to about 15.0% by weight of a protein additive with sufficient specificity to constitute anticipation.;

(3) about 4.0% to about 18.0% by weight water in the product with sufficient specificity to constitute anticipation and/or render inherent the claimed microscopy element and/or to provide enablement for the particularly claimed pasta structure as described by the microscopy parameter;

(4) the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification.

With reference to difference (1) at least about 50.0% by weight of the flour mixture comprising gluten protein, the Office Action refers to Applicants' Specification which discloses the limitation of at least about 50.0% by weight of the flour mixture comprising gluten protein. However, the Office Action has not identified a passage in Ventres that discloses a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein. Ventres at page 3, line 40 only refers to "glutinous flour." However, at line 47, Ventres states "There are different grades of semolina having different grades of glutinous properties." Nowhere does Ventres even make reference to a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein, nor that glutinous flour means one having at least about 50.0% by weight of the flour mixture comprising gluten protein, and there can be no anticipation due to the difference (1) as stated above.

With reference to difference (2), Ventres at Claim 14 on page 15 referred to in the Office Action fails to disclose about 1.0% to about 15.0% by weight of a protein additive with sufficient specificity to constitute anticipation. The present claim 1 specifies a protein additive, which would be in addition to any protein present in the flour. Ventres Claim 14 is a comprising claim that lists multiple ingredients. Claim 14 does not require added protein, so that its concentration may be 0 or less than 1.0%, or it can be more than 15.0 % such that the claim limitation of at least 75 % flour is still met. In light of Ventres failure of sufficiently specific disclosure of added protein, there can be no anticipation due to the difference (2) as stated above.

With reference to difference (3), the Office Action position notwithstanding, Ventres at p. 3, lines 10-12 (as well as p. 4 lines 3-11) fails to disclose about 4.0% to about 18.0% by weight water in the product with sufficient specificity to constitute anticipation. Moisture content at or below 28 % could mean 0 % moisture to less than 4 % moisture, and it could mean more than 18 % moisture, both of which are not what is presently claimed. The Office Action position notwithstanding, Example 9 discloses 21.2 % wt. Extrudate Moisture. See Table III, Item 9, column 4. This is outside the range specified in claim 1. Moreover, the calculation presented in the Office Action on page 4 does not take into account the moisture content in the 4000 g flour, which takes the total moisture content well beyond the 13.7 % which is based only on the 640 g added moisture. In light of Ventres failure of sufficiently specific disclosure of water in the product, there can be no anticipation due to the difference (3) as stated above.

With reference to difference (4), the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification, the Office Action admits that it is not specifically disclosed. Neither is there inherency. With reference to Claim 1, since all the same ingredients and process are not disclosed in Ventres as discussed above, the product does not necessarily have the same properties, and therefore there is no inherency. Ventres is aimed at reducing the drying requirements to achieve savings in energy and time. See abstract. In contrast, the process by which the present product is produced is aimed at achieving the electron microscopy parameter specified in claim 1, which is neither disclosed nor necessarily/inherently achieved by Ventres. As evidenced by Example 2 of the present Specification, the electron microscopy parameter is process dependent and Ventres uses a different process. Accordingly, there can be no inherency nor anticipation.

Claims 5, 7, 8, 9, 11 and 13 are not anticipated as dependent on claim 1 which is not anticipated as discussed above.

Appellants respectfully request that the anticipation rejections be overturned.

The Claims Are Not Obvious under 35 USC 103 over Ventres in view of Oh

The Examiner has rejected claims 19 and 20 under *35 USC 103 (a)* as unpatentable over Ventres as cited above in view of Oh et al. (US 6,217,918). As admitted by the Examiner, Ventres do not disclose:

(5) a meal kit comprising farinaceous-based food product.

Oh et al. are directed to a microwave container containing liquid food products (sauce component).

Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

Appellants submit that claims 19 and 20, specifically directed to a meal kit, are non-obvious as they depend on Claim 1 which is novel and non-obvious as discussed above. Additionally, Appellants submit that Claims 19 and 20 are separately patentable.

Appellants maintain that Ventres in view of Oh fail to disclose or suggest, among others, the following Claimed limitations:

- (4) the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification.

The electron microscopy parameter specified in claim 1 (difference 4 discussed above), which is neither disclosed nor necessarily/inherently achieved by Ventres, is not disclosed or predictable based on Oh et al.

In fact, with reference to difference (4), the claimed electron microscopy parameter, Oh et al. teach away from the present invention. Oh et al. dry freshly extruded pasta by toasting (i.e. using heated ambient air without added moisture). See

Col. 2, lines 39-45. As discussed in the present Specification and comparative Example 2, this method is contrary to that of the present invention which dries pasta in the presence of moisture and which would not achieve the claimed electron microscopy parameter specified in claim 1. The method of Oh et al. confirms difference (4) which is the parameter claimed for the food product of claim 1 and its dependent claims.

The Office Action cites to Col. 4, lines 33-35 of Oh for disclosure of lecithin. However, this is not relevant to the farinaceous product of the present inventions as Oh et al. disclose lecithin for use in granular product, which is a sauce component in the packaged product of Oh et al. See Oh et al. at Col. 4, lines 13-45. Therefore, Ventres and Oh cannot be combined for showing the lecithin component. The fact that an element of a claim (e.g. lecithin, pasta packaged in a container) is disclosed somewhere in the art is not sufficient to constitute a *prima facie* case of obviousness. The invention must be viewed as a whole. Viewed as a whole, the present claims are non-obvious.

Even if Oh were to use the same ingredients as Ventres, as suggested in the Office Action at page 6, Ventres does not disclose the presently claimed farinaceous-based food product (neither does Oh), as discussed above. Therefore, there is no obviousness over Ventres in view of Oh.

Accordingly, the claims are patentable.

CONCLUSION

In view of the above, Appellants respectfully submit that proper rejections under 35 USC 102(b) and 103(a) have not been made. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

Respectfully submitted,

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VIII. CLAIMS APPENDIX

1. (previously presented) A farinaceous-based food product comprising
 - (a) about 1.0% to about 15.0% by weight of a protein additive;
 - (b) about 0.25% to about 2.5% by weight of a hydrophobic ester; and
 - (c) about 65.0% to about 95.0% by weight of a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein;
 - (d) about 4.0% to about 18.0% by weight water;wherein the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification.
5. (original) The farinaceous-based food product according to claim 1 wherein the protein additive is dried or liquid egg white, dried or liquid whole egg, gliadin or a mixture thereof.
7. (original) The farinaceous-based food product according to claim 1 wherein the hydrophobic ester has an HLB of under about 13.
8. (original) The farinaceous-based food product according to claim 7 wherein the hydrophobic ester is mono- or di-acylglyceride, sorbitan ester, sucrose ester, lecithin, or mixture thereof.
9. (original) The farinaceous-based food product according to claim 1 wherein the microscopy image further comprises starch granules homogeneously dispersed therein.
11. (original) The farinaceous-based food product according to claim 1 wherein the food product, at the time of extrusion and as an extruded mixture, comprises from about 25.0% to about 35.0% by weight water.

13. (original) The farinaceous-based food product according to claim 1 wherein the food product comprises flavors, or tomato, spinach, artichoke, pepper, or eggplant powder or particulate, vitamin, spices, acidulant or a mixture thereof.

19. (original) A meal kit comprising the farinaceous-based food product of claim 1.

20. (previously presented) The meal kit according to claim 19 wherein the meal kit can be heated in boiling water or a microwave oven.

IX. EVIDENCE APPENDIX

No additional evidence had been submitted.

X. RELATED PROCEEDINGS APPENDIX

Neither the Appellants, their legal representatives nor the Assignee are aware of any proceedings relating to the present Appeal.